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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10
11 XPAYS, INC., a Delaware Corporation,

12 Plaintiff,

13 vs.

14 DOES 1 through 995,

15 Defendants.

CASE NO. CV 11-05880 ODW
(FFMx)

[Assigned to the Honorable Otis D.
Wright II, Courtroom 11]

**PLAINTIFF'S EX PARTE
APPLICATION FOR
EXPEDITED DISCOVERY;
[PROPOSED] ORDER**

Complaint Filed: July 18, 2011
Trial Date: Not Set

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18 **TO ALL INTERESTED PARTIES HEREIN AND TO THEIR RESPECTIVE**
19 **ATTORNEYS OF RECORD:**

20 NOTICE IS HEREBY GIVEN that, pursuant Federal Rule of Procedure, Rule
21 26(d)(1), Plaintiff, XPAYS, INC. respectfully applies ex parte for an Order allowing
22 Plaintiff to take immediate discovery.

23 Good cause exists for this ex parte application inasmuch as each of the DOE
24 defendants identified in the Complaint are currently known to Plaintiff only by his/her
25 Internet Protocol ("IP") address. Discovery is needed to identify said DOE defendants
26 so that Plaintiff may proceed against them in this matter. Specifically, Plaintiff seeks
27 to subpoena the identifying information for the DOE defendants from the respective
28 defendants' Internet Service Providers ("ISPs").

1 Notice of this ex parte application was not given because no defendant has been
2 served in this action and Plaintiff currently does not have the contact information for any
3 defendant.

4 This application is based upon this Notice of Application, the accompanying
5 Memorandum of Points and Authorities, the records and files of this Court, and all other
6 matters of which the Court may take judicial notice.

7
8 Dated: July 20, 2011

By: /s/ Michael W. Fattorosi
Michael W. Fattorosi, Attorney for
Plaintiff, XPAYS, INC., a Delaware
Corporation

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff, XPAYS, INC., by and through undersigned counsel, brings this ex parte
3 application for an Order allowing Plaintiff to take immediate discovery.

4 **I.**

5 **INTRODUCTION AND FACTUAL BACKGROUND**

6 Plaintiff XPAYS, INC. is a Delaware Corporation with its principal place of
7 business in San Francisco County, California. Plaintiff was and is in the business of
8 licensing, marketing and otherwise exploiting adult entertainment motion pictures in
9 various media. In particular, Plaintiff is the owner of rights in the valid registered
10 copyright for the motion picture entitled “Home Video,” also known as the “Paris Hilton
11 Sex Tape” (hereinafter referred to as the “Motion Picture”), United States Copyright
12 Registration Number PAu2-780-223.

13 Defendant DOES 1 through 995 are individuals whose true names and addresses
14 are currently unknown to Plaintiff. DOES 1 though 995 have unlawfully reproduced
15 and distributed the Motion Picture on the Internet without authorization from Plaintiff.
16 However, Plaintiff can only identify these particular infringers by way of further
17 investigation. As such, Plaintiff wishes to take early discovery to further identify these
18 defendants.

19 Information will be requested in later subpoenas issued to cable operators and
20 Internet Service Providers (“ISPs”) which is governed by 47 U.S.C. § 551. This statute
21 prohibits cable operators from disclosing personally identifiable information pertaining
22 to subscribers without the subscriber’s express consent unless there is “a court order
23 authorizing such disclosure, if the subscriber is notified of such order by the person to
24 whom the order is directed.” 47 U.S.C. § 551(c)(2)(B).

25 Accordingly, Plaintiff requests that the Court issue an Order allowing Plaintiff to
26 issue subpoenas to cable operators and ISPs instructing them to produce any and all
27 documents and/or information sufficient to identify the DOE defendants in this matter.

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1 **II.**

2 **EX PARTE RELIEF IS WARRANTED**

3 Pursuant to Fed.R.Civ.P. Rule 26(d)(1):

4 A party may not seek discovery from any source before the parties have
5 conferred as required by Rule 26(f), except in a proceeding exempted from
6 initial disclosure under Rule 26(a)(1)(B), or when authorized by these
rules, by stipulation, or by court order.

7 Currently Plaintiff is unable to identify the DOE defendants other than by their IP
8 addresses. Discovery is needed in order to allow Plaintiff to subpoena information
9 identifying said DOES in order to proceed with the litigation of this matter. Without
10 such information, Plaintiff is unable to serve the Summons and Complaint or in any
11 other way proceed with the litigation of this matter against the DOE defendants. The
12 only known means for Plaintiff to identify the DOE defendants is through such
13 discovery. Therefore, because ex parte relief is warranted, the Court should grant
14 Plaintiff's ex parte application.

15 **III.**

16 **ARGUMENT**

17 **A. Good Cause Exists for the Court to Order Immediate Discovery**

18 The Federal Rules of Civil Procedure allow for discovery prior to a Rule 26(f)
19 scheduling conference upon a showing of good cause. *Semitool, Inc. v. Tokyo*
20 *Electronic America, Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal. 2002).

21 Good cause may be found where the need for expedited discovery, in
22 consideration of the administration of justice, outweighs the prejudice to
23 the responding party . . . Good cause is frequently found in cases involving
claims of infringement . . .

24 *Id.* at 276. There is no prejudice to the DOE defendants, as the early discovery would
25 merely allow them to be identified earlier.

26 More specifically, courts have recognized that, "[s]ervice of process can pose a
27 special dilemma for plaintiffs in cases like this in which the tortious activity occurred
28 entirely on-line." *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal.

1 1999). Accordingly, courts have developed the following factors to consider when
2 granting motions for expedited discovery to identify anonymous Internet users: (1)
3 whether the plaintiff can identify the missing party with sufficient specificity such that
4 the court can determine that defendant is a real person or entity who could be sued in
5 federal court; (2) all previous steps taken by the plaintiff to identify the Doe defendant;
6 and (3) whether the plaintiff's suit could withstand a motion to dismiss. *Id.* at 578-80.
7 Each of these factors resolves in favor of granting Plaintiff's requested relief.

8 First, Plaintiff has sufficiently identified individuals who are real persons Plaintiff
9 could sue in Federal Court. Plaintiff observed and documented infringement of its
10 registered works by the individuals pseudonymously identified as DOES in the
11 Complaint. The recorded IP addresses of such DOES are set forth in Exhibit "A" to the
12 Complaint. Plaintiff is informed and believes that each DOE defendant is a California
13 resident. The requested discovery is necessary for Plaintiff to determine the identifying
14 information of such DOES so that Plaintiff may litigate this matter against them.

15 Second, there are no other practical measures Plaintiff could take to identify these
16 Defendants. Plaintiff is aware of no available information that would identify the
17 infringing users, other than information maintained by the cable operators and ISPs.
18 Due to the nature of on-line transactions, Plaintiff has no way of determining
19 Defendants' identities except through subpoenaing this information. There is no
20 prejudice to the DOE defendants by allowing the early discovery, as the early discovery
21 would merely allow them to be identified without delay.

22 Third, Plaintiff has asserted a prima facie claim for copyright infringement in its
23 Complaint that can withstand a motion to dismiss. Specifically, Plaintiff has alleged that
24 (a) it owns and has registered the copyright in the work at issue and (b) the DOE
25 Defendants made unauthorized reproductions of those works and distributed them
26 without Plaintiff's authorization. These allegations state a claim for copyright
27 infringement. 17 U.S.C. § 106(1)(3).

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1 When outlining the above factors, the court in *Columbia* noted that in cases where
2 injured parties are likely to find themselves chasing unidentified tortfeasors from ISP
3 to ISP, the traditional enforcement of strict compliance with service requirements should
4 be tempered by the need to provide injured parties with a forum in which they may seek
5 redress for grievances. *Columbia*, 185 F.R.D. at 579. An analysis of the factors clearly
6 demonstrates Plaintiff's legitimate interest in identifying the personally identifying
7 information for the individuals who infringed upon its copyrighted works. Thus, the
8 Court should grant the instant ex parte application.

9 **B. Request For Discovery**

10 In addition to the three factors discussed above, courts have indicated that a
11 plaintiff requesting early discovery to identify defendants should justify specific
12 requests and explain how such requests "will lead to identifying information about [the]
13 defendant that would make service of process possible." *Columbia* 185 F.R.D. at 580;
14 *Gillespie v. Civiletti*, 629 F. 2d 637, 642 (9th Cir.1980).

15 The infringement and other wrongful acts at issue in this action occurred through
16 the unlawful reproduction and distribution of Plaintiff's copyrighted works on the
17 Internet. Individuals gain access to the Internet through an Internet Service Provider
18 (ISP). When an ISP provides Internet access to a subscriber, it does so through a
19 modem located at the subscriber's home or office. Each time the subscriber accesses
20 the Internet, the ISP provides a unique number to the subscriber called an Internet
21 protocol (IP) address. This is somewhat akin to a telephone number. The IP address
22 for a subscriber may stay the same (a static IP address) or it may change from time to
23 time (a dynamic IP address). ISPs generally record the times and dates it assigns each
24 IP address to a subscriber.

25 Online technology used to engage in unlawful online copyright theft relies on the
26 ability to identify the computers to and from which users search and exchange files. The
27 technology identifies those computers through the IP address from which the computer
28 connects to the Internet. In this manner, the ISPs has records of the IP addresses from

1 which individuals accessed the Internet for the purpose of unlawfully reproducing and
2 distributing Plaintiff's works.

3 Plaintiff has, with reasonable certainty, determined which ISP controls each DOE
4 defendant's IP address. Plaintiff seeks to subpoena the identifying information of the
5 DOE defendants from such relevant ISPs.

6 Based thereon, Plaintiff requests that the Court issue an order allowing Plaintiff
7 to serve a subpoena on the relevant ISPs requesting the specific subscriber information
8 necessary to identify the DOE defendants. Since 47 U.S.C. §551 (The Cable Privacy
9 Act) prohibits cable operators from disclosing personally identifiable information
10 concerning subscribers without the prior written or electronic consent of the subscriber
11 or a court order, and since some ISPs are also cable operators, Plaintiff requests that the
12 Order state clearly that the Court contemplated the Cable Privacy Act and that the order
13 specifically complies with the Act's requirements. *See*, 47 U.S.C. §551.

14 IV.

15 CONCLUSION

16 Based on the foregoing, Plaintiff respectfully requests that the Court issue an
17 Order allowing early discovery and instructing any relevant ISPs identified to produce
18 any and all documents and/or information sufficient to identify the DOE defendants.

19 Plaintiff will only use this information to prosecute the claims made in its
20 Complaint. Without this information Plaintiff cannot pursue its lawsuit to protect its
21 copyrighted works.

22 Such discovery should be conditioned on (a) the ISPs having 7 calendar days after
23 service of the subpoenas to notify the subscriber that their identity is sought by Plaintiff,
24 and (b) each subscriber whose identity is sought having 21 calendar days from the date
25 of such notice to file any papers contesting the subpoena.

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1 Plaintiff requests that the Order state clearly that the Court contemplated the
2 Cable Privacy Act and that the order specifically complies with the Act's requirements.
3 *See*, 47 U.S.C. §551.

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5 Dated: July 20, 2011

By: /s/ Michael W. Fattorosi
Michael W. Fattorosi, Attorney for
6 Plaintiff, XPAYS, INC., a Delaware
7 Corporation
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents described as **PLAINTIFF'S EX PARTE APPLICATION FOR EXPEDITED DISCOVERY; [PROPOSED] ORDER** with the Clerk of the Court for the United States District Court for the Central District of California by using the appellate CM/ECF system on July 20, 2011.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Executed on July 20, 2011, at Woodland Hills, California.

/s/ Michael W. Fattorosi
MICHAEL W. FATTOROSI